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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

No. 111

JULIUS ROSENBERG and ETHEL ROSENBERG,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA.

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

The petitioners, Julius Rosenberg and Ethel Rosenberg, pray for a rehearing and reversal of the order of this Court, entered on October 13, 1952, denying their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

This petition for rehearing is made, pursuant to the provisions of Rule 33 of the rules of this Court, upon substantial grounds available to the petitioners, although not previously presented.

### Reasons Why a Rehearing Should be Granted and a Writ of Certiorari Issued

The petitioners urge five substantial grounds, previously available to them, although not presented on their original petition for a writ of certiorari. They submit to the Court, however, that justice will not be done unless this

Court grants review, not only of the questions presented here, but of the issues heretofore raised in the original petition.

The significance and portent of this case, unique in the annals of our jurisprudence, in which the petitioners, husband and wife, stand to forfeit their lives, merit the full measure of the consideration of this Court.

## I

The Espionage Act (18 U. S. C. A. Sec. 32(a) and 34, now 18 U. S. C. A. Sec. 794) as construed by the Courts and applied to the facts of this case violates Article III, Section 3 of the Constitution of the United States. The article declares:

> "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

This constitutional prescription, on its face, and by judicial interpretation, establishes the two essential elements of the crime of treason: adherence to the enemy and rendering him aid and comfort, the former a state of mind, and the latter a physical act. *Cramer* v. *United States*, 325 U. S. 1 (1945).

Historically, the single characteristic of the high crime of treason, which distinguishes it from all other crimes, is the state of mind of a citizen which puts him in mental opposition to the interests of the United States and its citizens, during time of war. The overt act requirement was deemed only insurance against the punishment, as crime, of purely mental processes. *See, e.g.: United States* v. *Fries*, 9 Fed. Cas. No. 5, 126 (1799); *United States* v. *Fries*, 9 Fed. Cas. No. 5, 127 (1800); *United States* v. *Hanway*, 26 Fed. Cas. No. 15, 299 (1851); *United States*

v. *Horie*, 26 Fed. Cas. No. 15, 407 (1808); *United States* v. *Warren*, 247 F. 708 (D. C., E. D. Pa., 1918). The essence of these cases is stated in McKinney, *Treason under the Constitution of the United States*, 12 Ill. L. Rev. 381, 383-4, 394 (1918):

> "* * * the law of treason differed from that of other crimes in this, that the intention to break ties of allegiance was the prime thing, and the overt act only necessary in that purely mental processes might not be punished as crimes.
>
> "* * * 'adhering to their enemies' * * * comprises those [persons] who consciously and of their own free choice are not 'on our side', but who put themselves in mental opposition to the purposes, wishes and desires of the United States and its citizens while engaged in its foremost right and chief duty as a nation, that of defending itself, its sovereignty and its rights. Such a person, although not yet legally guilty of the crime of treason, has nevertheless been guilty of his breach of allegiance to the United States, and needs only to add to such breach of allegiance (which is the essence of treason) some overt act, to make him legally and completely guilty of the crime of treason * * *."

This Court has acknowledged the correctness of this view. See: *Cramer* v. *United States*, *supra*; *Haupt* v. *United States*, 330 U. S. 631, 634-35. In the *Cramer* case, the Court stated (at p. 45):

> "Of course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name. But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety. The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and *the trial thereof may be focussed upon the defendant's specific intent to do those particular acts thus eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities* * * *." (Emphasis ours.)

In the instant case, the court below ruled that the statutory intent under the Espionage Act could be, and was here, satisfied by "evidence of an American's devotion to another country's welfare" (R. 1654). On this thesis, the court approved the introduction of evidence "to the effect that (1) the defendants expressed a preference for the Russian social and economic organization over ours, and (2) that the defendants were members of the Communist Party" (R. 1654), which "was part of, and subject to, the Communist International * * * [and] received orders from Russia to propagandize, spy and sabotage; and that Party members were bound to go along with those orders under threat of expulsion" (R. 1655).

The conjunction of the concept evolved and the proof accepted by the court below permitted evidence of intent indistinguishable from haboring "sympathies or convictions disloyal to this country's policy or interest" [*Cramer* v. *United States, supra*, at p. 24]; or "intention * * * to injure the Unites States" [*Haupt* v. *United States, supra*, at p. 641]; or "want of loyalty to the government" [*Charge to Grand Jury—Treason*, 30 Fed. Cas. No. 18, 272 (1861), at p. 1036], states of mind heretofore deemed adequate to meet the criteria for proof of "treasonable" intent.

When the lower court's construction of the intent provisions of the Espionage Act is read together with this Court's interpretation of the scope of that Act in *Gorin* v. *United States*, 312 U. S. 19 (1941), it becomes apparent that the statute as construed and applied here created an identity between the criminal state of mind contemplated under the treason clause and that under the Espionage Act. In the *Gorin* case, this Court stated (at pp. 29-30): "* * * No distinction is made between friend or enemy. Unhappily the status of a foreign government may change." The accepted rationale that potential enmity is the equivalent of present enemy status, combined with the construction of the law and proof admitted in the instant case, established here an intent equivalent in every way to treasonable intent.

The petitioners were citizens of the United States and the prosecution against them was for violations of the Espionage Act in time of war. Since the substantive provisions of the Espionage Act, and the substantive breaches of the law allegedly proven in the instant case, unquestionably constitute giving "Aid and Comfort" under the treason clause [see: e.g., *Cramer* v. *United States, supra; Haupt* v. *United States, supra; United States* v. *Werner*, 247 F. 708 (D. C., E. D. Pa., 1918); *Charge to Grand Jury—Treason, supra; Charge to Grand Jury*, 30 Fed. Cas. No. 18, 271 (1861); *United States* v. *Greathouse*, 26 Fed. Cas. No. 15, 254 (1863)], the Espionage Act permitted the conviction and the petitioners were convicted of, a crime, identical to the crime of treason,[1] an identity completed by the imposition of a sentence of death, a penalty traditionally accorded to traitors. See: *United States* v. *Greathouse, supra;* Hurst, *Treason in the United States*, 58 HARV. L. REV. 375, 425.

In the most pragmatic sense, the petitioners were tried as "traitors". The prosecutor, in his opening statement derogated the "loyalty" of the petitioners to this country (R. 180, 181), described their activities as "traitorous" and "treasonable", promised the jury overwhelming "evidence of these traitorous acts" (R. 182, 183, 184) and repeated, in his closing, references to the petitioners as "traitors" and their "betrayal" (R. 1517, 1518, 1535).

The trial judge himself charged the jury that "irrational sympathies must not shield proven traitors" (R. 1550), and, made it clear on the sentence, that he was impelled to invoke the death penalty by his belief in the petitioners'

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[1] The court below misstated and misconstrued this contention of the petitioners, on rehearing, when it attributed to them the assertion that the crime of which they were convicted was lesser than, or in some elements, different from, treason (R. 1709-10). For this reason the lower court's reliance on *Ex parte Quirin*, 317 U. S. 1 (1942), was inapt, even if it be assumed that the *Quirin* case is sound (see *infra*, pp 7-10). In the *Quirin* case, according to the court, the elements of the crime charged and proven, differed in at least one aspect from treason.

"treachery" and "betrayal of their fellow countrymen" (R. 1613, 1614, 1615).

This Court has proclaimed that the requirements of the treason clause can neither be overridden nor circumvented by "giving the same offense a different name". *Cramer* v. *United States*, *supra*, at p. 45. The authorities are equally insistent that:

> "* * * Where [a] defendant is charged with conduct involving all of the elements of treason within the constitutional definition, and the gravamen of the accusation against him is to aid its [the country's] enemies, it would seem in disregard of the policy of the Constitution to permit him to be tried under another charge than treason."

Hurst, *Treason in the United States*, *op. cit.*, *supra*, at p. 21. See also: *Wimmer* v. *United States*, 264 F. 11 (C. C. A. 6th, 1920), cert. den. 253 U. S. 494; *United States* v. *Greathouse*, *supra*.

The petitioners, here, were subjected to a treason prosecution, under color of a charge of conspiracy to commit espionage. Under the facts of this prosecution, where the accusation involved disclosure of atom-bomb secrets to the Soviet Union, a circumstance, in the contemporay climate, of inherent "passion-rousing potentialities", the petitioners were constrained to bear the added burden of the "passion-rousing potentialities" of an actual charge of "treason". And this without the constitutional safeguards afforded persons accused of treason, namely, conviction only on the "Testimony of two witnesses to the same overt Act". Were these petitioners accorded the protections secured to them by the Constitution, they would not have been compelled to stake their lives on the uncorroborated and second hand evidence of accomplices introduced on the theory of, and in the dragnet of, a conspiracy prosecution.[2] "The [trea-

[2] Some of the alleged overt acts here, because innocent on their face, would have been incompetent to prove treason. *Cramer* v. *United States*, *supra*. Others, otherwise competent on the treason

son] provision was adopted not merely in spite of the difficulties put in the way of prosecution but because of them." *Cramer* v. *United States*, *supra*, at p. 48. Mr. Justice Jackson, writing in the *Cramer* case, noted that this policy was justified because "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence".

It is submitted, therefore, that the entire proceeding below was in derogation of Article III, Section 3 of the Constitution of the United States.

## II

The court below, ignoring the equivalence between friend and enemy postulated by the *Gorin* case, reasoned that the Espionage Act, as construed, and here applied, rendered criminal, only, aid and comfort to a "friend", and that the crime, although "of the same kind as treason", was, therefore, not treason. To arrive at this conclusion, the court relied on the ruling of this Court in *Ex parte Quirin*, 317 U. S. 1, 38 (1942), to the effect that a crime distinct from treason is committed where it differs, in any element, from the constitutional definition of treason (R. 1709-12).

The petitioners submit that precisely because the Espionage Act (if the *Gorin* case be ignored) was construed and here applied so as to license prosecution for rendering aid and comfort to other than an "enemy"—where, otherwise, the crime is "of the same kind as treason"—it violates the strictures of Article III, Section 3 of the Constitution.

charge, were not proved by the testimony of two witnesses. The evidentiary standards to prove the requisite intent, would not have been met. See *Haupt* v. *United States*, *supra*; *Cramer* v. *United States*, *supra*. It is impossible to tell on the jury's general verdict whether it selected, as evidence for conviction, that which would have satisfied treason criteria.

Their assertion is enforced by the universal recognition that the treason clause was designed to curb the evolvement of new treasons. This Court, in *Cramer* v. *United States, supra,* at p. 24, said of its framers:

> "They wrote into the organic act of the new government a prohibition of legislative or judicial creation of new treasons."

If, therefore, a "proposed law on the subject of Treason neither enlarges nor lessens its Constitutional definition, the law is unnecessary; *if it does the one or the other it is unconstitutional*". 5 King, LIFE AND CORRESPONDENCE OF RUFUS KING (1898) 73-75. (Emphasis ours.) And if Congress should seek to evade the plain mandate of the treason clause "by giving the same offense another name", such a law would, as well, violate the Constitution. *Cramer* v. *United States, supra,* at p. 45.

The variation in elements between a crime defined by statute and the constitutionally defined crime of treason is apparently not of the essence in taking the constitutional measure of a statute. On the one hand, if a crime is "of the same kind as treason", the differences in elements may spell its constitutional doom. If, on the other hand, they are differences which neither enlarge nor lessen the constitutional definition, the crime remains treason, under the aegis of Article III, Section 3, and the differences become meaningless. The focus of any examination to ascertain a statute's constitutional validity *vis-a-vis* the treason clause must, therefore, be directed to the constant core of the issue: whether the crime created is "of the same kind as treason".

It is indicated in Point I above (see, *supra,* pp. 2-3) that the single factor which distinguishes treason from all other crimes, whether of greater or lesser degree, is the general intent to oppose and betray the interests of the United States.

Even apart from the rationale of the *Gorin* case referred to hereinabove, it is not novel, in times of international tension, to infer such an intent from adhering to a nation not formally at war with this country. The undeclared maritime conflict between the young republic and France in 1798 produced a ruling from Attorney General Lee that "France is our enemy, and to aid, assist, and abet that nation in her maritime warfare will be treason in a citizen or any other person within the United States not commissioned by France". 1 Op. Atty. Gen. (Gilpin Ed., 1841), pp. 49-50. The reaction of the prosecutor and judge in the instant case—and, undoubtedly, the jury and the public—demonstrate that, in the current era of "cold war", adherence to the "friendly" Soviet Union may well be regarded as "betrayal" (R. 180-84, 1517-18, 1535, 1550, 1613-15).

In the light of this history and the policy of the treason clause to guard against the unlimited "accusation of treachery" and to protect those charged with the "general intent to betray which has such passion-rousing potentialities" [see *Cramer* v. *United States*, *supra*], where the burden of a prosecution, under statutory mandate, is proof of "betrayal", the crime is "of the same kind of crime as treason." And insofar as the elements of that crime diverge from the constitutional definition of treason, they "enlarge" or "lessen" it, and thereby violate Article III, Section 3 of the Constitution, as does conviction upon such charge without recourse to its procedural protections on the trial. Any other view would render the treason clause powerless to prevent the creation of "new treasons", and would permit convictions for such treasons without the procedural safeguards for which provision is made. Yet literal adherence to the ruling of the *Quirin* case, a "hard case", could only produce these consequences.

Viewed in this aspect, there appears to be unquestioned validity to the criticism of Willard Hurst that the *Quirin* case serves to emasculate the treason clause. In his study of the background and present meaning of the treason

clause, solicited by the Department of Justice in connection with the reargument of the *Cramer* case before this Court, he stated (*Treason in the United States, op. cit., supra,* at pp. 421-22):

> "The decisions cited as analogies by the Court [in the *Quirin* case] are now standard authorities holding that the double jeopardy clause of the Constitution is not violated by conviction of two or more offenses which are in substance part of the same transaction, but which involve different elements in the allegation. It is not a convincing interpretation to apply to a constitutional guaranty having its own history of policy a formal test developed under a different clause of the Constitution, with no demonstration that the policies behind the respective clauses are so similar as to be fulfilled by the same criterion. The double jeopardy clause is historically a guaranty against abuse of the law enforcement machinery as such, without reference to abuses peculiar to any one of the major types of crime. When the Constitution singles out the offense of treason as subject to special abuse, citation of a highly technical rule developed by judicial construction out of the general guaranty is in itself little evidence that the peculiar dangers against which the special guaranty was erected have been avoided."

The court below, in the instant case, read the Espionage Act to permit its specific statutory intent to be proven by evidence demonstrative of a "general intent to betray" (see *supra,* p. 4), thereby transforming that law, by judicial fiat [*Screws* v. *United States,* 325 U. S. 91 (1945); *Skirotes* v. *Florida,* 313 U. S. 69 (1941); *Hebert* v. *Louisiana,* 272 U. S. 312 (1926)], into a "treason" statute, and the trial of the petitioners into a "treason" trial. That criminality can thus flow, under the Espionage Act, from adherence to a country not an "enemy" of the United States, cannot be seen as other than an "enlargement" of the constitutional definition of treason. That under such circumstances conviction was had without "Testimony of two Witnesses to the same overt Act", cannot be viewed as

other than in derogation of the procedural requirements of Article III, Section 3.

The court is urged, therefore, to consider revision of the *Quirin* case insofar as it deems itself inhibited thereby from ruling that the Espionage Act, as construed by the court below, violates Article III, Section 3, and that the convictions had herein were secured in contravention of its provisions.

## III

In the context of Points I and II above, the acceptance of proof of criminal intent by imputation from the alleged "Communist" affiliations of the petitioners, can now fully be seen to have opened a Pandora's box of evils.

Evidence of "devotion to another country's welfare" (R. 1654), admitted to prove the intent under the Espionage Act, as we have shown, transmuted that Act into a "treason" statute, and the trial into a "treason" trial. "Devotion" was established by evidence merely "to the effect * * * that they [petitioners] were members of the Communist Party". No proof was offered of their personal knowledge or acceptance of the tenets of that party, if any, that they were obliged, *qua* members, to commit espionage on behalf of the Soviet Union.

*Kutcher* v. *Gray* (No. 11172), decided on October 16, 1952, by the Court of Appeals for the District of Columbia, affirmed that membership in a Communist (Trotskyite) Party *per se* does not import "disloyalty" or disloyal adherence. This ruling, in essence, reaffirms *Schneiderman* v. *United States*, 320 U. S. 118 (1942), on the basis of which the petitioners had urged the exclusion of the "Communist" evidence (Petition for Certiorari at p. 40 *ff.*). Both of these cases were civil proceedings, where the evidentiary standards of protection are less stringent than in criminal trials. The acceptance of such evidence in a criminal case presents error of such gravity as to require examination by this Court, for this evidence was concededly "highly in-

flammatory" (R. 1655), prejudiced the petitioners and created the constitutional infirmities which we raise in this petition.

## IV

The due process clause of the Fifth Amendment to the Constitution is the guardian in "our concept of ordered liberty" of "what is deemed reasonable and right". See *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949). A sentence which is incompatible with due process of law will not be permitted to stand. *Townsend* v. *Burke*, 334 U. S. 736 (1948); *Williams* v. *New York*, 337 U. S. 241, 252 (1949).

The exercise of the wide discretion vested in a sentencing judge to acquire information on which to base his determination does not include a right to rely on unfair and "materially untrue" assumptions, "whether by carelessness or design". *Townsend* v. *Burke*, *supra*, at p. 741.

We press upon the court that the sentences here outrage decency and offend civilized concepts of fair play, founded as they were on "materially untrue" facts and extravagant assumptions.

The record in this case concededly embodies the entire basis upon which the trial court bottomed its determination to inflict the sentences of death upon the petitioners (R. 1674). Removed from the proximity, in time, of the conflict of a "passion-rousing" trial, an objective reading of the trial judge's remarks on sentence must agitate the candid conscience. His reasons assail reason and the intelligent and informed mind; they are an admixture of misinformation, sired by ignorance, and of unfair syllogisms, erected on infirm premises.

The justification of death in this case was that the "crime was worse than murder" (R. 1614). To find warrant for this view the trial judge disregarded the plain record—his only avowed source of information—to saddle the petitioners with a will to harm their country and to hold them culpable, contrary to the facts of history and science, for

a succession of national disasters. On this perverted foundation, the judge rested his conclusion that "plain deliberate contemplated murder is dwarfed in magnitude by comparison with [petitioners'] crime" (R. 1614).

The conspiracy was allegedly conceived at a time when the Soviet Union was a war-time ally, respected, aided and extolled by the Government of the United States and its public and private leaders. Nevertheless, the trial judge stated on sentence:

> "Citizens of this country who betray their fellow countrymen can be under none of the delusions about the benignity of Soviet power that they might have been prior to World War II" (R. 1613). "* * * Indeed, by your betrayal you undoubtedly altered the course of history to the disadvantage of our country. No one can say that we do not live in a constant state of tension. We have evidence of your treachery all around us every day—for the civilian defense activities throughout the nation are aimed at preparing us for an atom-bomb attack" (R. 1615).

He commented further:

> "Nor can it be said * * * that the power which set the conspiracy in motion * * * was not openly hostile to the United States at the time of the conspiracy" (R. 1615).

These remarks, conjoined with his limitation of the period of Soviet "benignity" to a time "*prior* to World War II", warped history to attribute to the petitioners' hostile mind *in limine*. Common knowledge of our wartime alliance with the Soviet Union, of course, confutes this legerdemain.

Moreover, the indictment on which petitioners were tried did not charge an "intent to injure" the United States, as it can be assumed it would have, were the Government in possession of evidence to establish such an intent. And, indeed, the record is bare of any such proof.

The forced finding that the petitioners had an "intent to injure" the United States changed the quality and gravity

of the offense.[3] Yet it was on the basis of the intent thus transmuted from "intent to advantage" to "intent to injure" that the sentences were inflicted. Fair play abominates the stratagem which makes the crime fit the punishment.

The trial judge cojoined with this fabricated malevolence of the petitioners, a weird and aggravated estimate of the importance and proximate consequences of their alleged crime, to extenuate the barbarity of his sentence. He stated:

> "I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country" (R. 1614-15).

Patently, these statements are unmitigated fiction. Their judicial pronouncement cannot serve to square their unreality with the facts of life, nor can sentences so spuriously supported comport with due process of law.

No one, other than the trial judge, has even pretended that the atom-bomb material allegedly transmitted in the course of the instant conspiracy, was of any substantial value to the Soviet Union.

As a general proposition, Dr. Harold C. Urey, one of the directors of the atomic bomb project, has affirmed that:

> "Any spies capable of picking up this information will get information more rapidly by staying at home and working in their own laboratories." N. Y. TIMES, March 3, 1946, p. 12.

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[3] Congress in passing the ATOMIC ENERGY ACT of 1946 (42 U. S. C. A. Sec. 1816) did not see fit to prescribe the death penalty for atomic espionage except where there exists an intent to injure the United States.

Specifically in relation to this case, the Government itself, after the trial, conceded that: "Greenglass' diagrams have a theatrical quality", and because he was not a scientist, "must have counted for little". *Report on Soviet Atomic Espionage,* Joint Comm. on Atomic Espionage, 82nd Cong., 1st Sess. (U. S. Gov't Printing Office, April, 1951). Reflections on the lack of value of the information allegedly transmitted here persist in scientific critiques. See: TIME, March 19, 1951;[4] LIFE, March 26, 1951;[5] SCIENTIFIC AMERICAN, May, 1951.[6] See also: Urey, N. Y. TIMES, March 3, 1951.[7]

It is perfectly clear that such valueless information could have had little effectiveness "in putting into the hands of the Russians the A-bomb", even had they not possessed the "secret".

It is universally conceded, propaganda to the contrary notwithstanding, that there was no basic "secret" concerning atomic weapons. Dr. J. Robert Oppenheimer, N. Y. TIMES, January 15, 1951; ATOMICS, September, 1949; Letter of Harold C. Urey to N. Y. TIMES, May 11, 1950. This concession extends as well to "know-how". The United States Atomic Energy Commission itself has supported this view, as quoted in an International News Service release datelined Washington, D. C., December, 1950:

> "The Atomic Energy Commission Friday bared secret documentary proof that Russia has known the

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[4] "* * * some of his [Greenglass'] testimony made little scientific sense."

[5] "* * * Greenglass' implosion bomb appears illogical, if not unworkable * * *."

[6] "What the newspapers fail to note was that without quantitative data and other necessary accompanying information, the Greenglass bomb was not much of a secret."

[7] Detailed data on the atom bomb, he declared, would require "eighty to ninety volumes of close print" which only a scientist or engineer would be able to read.

> scientific secrets of *atom-bomb manufacture* since 1940, the year the United States began attempts to develop the missile." (Emphasis ours.)

The decisive factor, in terms of the extent of the time lag between our possession of the bomb and its development by the Soviet Union, was the degree of the industrial strength and technology of the Soviet Union, not its scientific knowledge. That time lag was given, by experts, an outside limit of five years. Dr. Irving Langmuir, N. Y. TIMES, October 9, 1945, p. 9; Newman, *Control of Atomic Energy*, 56 YALE L. J. 769; *Report on Soviet Atomic Energy*, *op. cit.*, *supra*, at pp. 7, 13-14. On this topic, Dr. Urey commented:

> "In my opinion if we published all our data in detail we would not shorten the five * * * years of General Grove's estimate by very much. It takes time to build plants, and it takes time to operate them. Address, reprinted in SCIENCE, November 2, 1945.

Scientific judgment undermines the validity of the trial judge's claim that the petitioners' conduct, did or could have, put "into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb". Because of these findings of the scientific world, matters of common knowledge before the trial here, this basis for imposing death is exposed as "materially untrue", a vice which must vitiate the sentences.

If the trial judge displayed irresponsibility, in blinding himself to the facts and capitulating to the popular myth of atomic monopoly, he threw all rationality and judicial temperance to the winds when he judged the petitioners' to have "caused * * * the Communist aggression in Korea, with the resultant casualties exceeding 50,000 * * *" and thus "undoubtedly [to] have altered the course of history to the disadvantage of our country".

The question of the responsibility for the commencement of the war in Korea is still hotly debated in this

country, and inconclusively resolved.[8] But one fact is uncontrovertibly clear: No responsible official fastens this guilt on the petitioners. While in the arena of political life, it is not uncommon to create "whipping boys", due process cannot sanction similar judicial victimization in the courtroom.

Yet all the convoluted reasoning of the trial judge cannot conceal the basic inequity in measuring the severity of the punishment on the gauge of extant political circumstances.[9]. Since reason understands that this crime, if disposed of at the time it was laid, would not have incurred a harsh or vindictive sentence, the sense of fairness is shocked by the exaction of retribution for subsequent events

[8] The following are some of the varied opinions of American statesmen on the responsibility for the origin of the conflict: Sumner Wells (N. Y. WORLD-TELEGRAM, March 28, 1951, p. 24: "The statement issued by the State Department in January 1950, that the Republic of South Korea * * * was 'not within our line of defense'."); Thomas E. Dewey (N. Y. TIMES, Sept. 19, 1951, pp. 10-11: "'On-again-off-again' policy on Formosa * * *."); Dwight D. Eisenhower (N. Y. TIMES, Sept. 5, 1952, p. 1: "We are in that war because this Administration abandoned China to the Communists."); Retired Rear Admiral Ellis M. Zacharias (N. Y. TIMES, June 21, 1951: "Korea was a blunder by both Russia and the United States."); Wilbur W. Hitchcock, former member U. S. Military Gov't in Korea (CURRENT HISTORY, March 1951: "* * * Soviet Union in fact did not initiate the war [and] far from throwing the switch, was just as surprised as was the Western World when the North Koreans threw the switch.")

These examples could be multiplied *ad infinitum;* there are almost as many opinions as people.

[9] The vindication of the sentences by the court below on the ground of the continuance of the conspiracy into the "cold war" period (R. 1680-81) is a mere rationalization of the trial judge's position. Were this the criterion it would have been reasonable to expect a sentence other than death for the petitioner, Ethel Rosenberg, as to whom the record is bare of post-war involvement. And as to both petitioners, the concurring judge (Frank, J.) suggested consideration on sentence of "the fact that the evidence of the Rosenbergs' activities after Germany's defeat (as well as of their earlier espionage activities) came almost entirely from accomplices" (R. 1677).

and reversed political relations over which the petitioners had neither control nor clairvoyance to fortell.

The concept of fair play, the essence of due process, commands that these sentences be set aside.

## V

In their petition for a writ of certiorari, the petitioners interposed a challenge to the constitutionality of the sentence which, if upheld, would have precluded the necessity for consideration of the sentence of death on the level of an abuse of discretion of the sentencing judge.

The denial of the writ of certiorari now makes it appropriate to raise the question of the excessiveness of the sentences.

Section 2106 of Title 28 U. S. C. A. provides:

> "The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or review any judgment * * * lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment * * *, or require such further proceedings to be had as may be just under the circumstances."

It is difficult to conceive of a statute drawn more clearly and explicitly to express the legislative intent to confer the broadest power upon the Federal appellate courts to control in whole and in detail judgments of the lower courts.

*A fortiori*, sentence, which is embodied in and forms an integral part of a judgment of conviction, would be reached by the power to " * * * modify, vacate, set aside or reverse * * * ".

The question of appellate power to revise a sentence under the terms of Section 2106 is *res nova*. The court below acknowledged that "No decision by the Supreme Court or any Federal Court of Appeals seems to have cited or considered this statute in passing on the question of the power to reduce a sentence when a conviction is affirmed" (R. 1673-74).

If the various Federal Courts of Appeal have denied themselves this power their decisions have not been influenced by any inhibitions on power contained in Section 2106.

The court below, nevertheless, considered itself impotent in the face of what it termed "sixty years of undeviating federal precedents" holding "that an Appellate Court has no power to modify a sentence" (R. 1671). In this the lower court fell into error. Authorities which so hold rely on the anachronism of a rule enunciated in *Ex parte Watkins*, 7 Pet. 568, 574, decided at a time when the Supreme Court had no Federal criminal appellate jurisdiction over either judgments or sentences, and prior to the enactment of Section 2106 or its predecessors. But this Court, even without dependence upon the authority of Section 2106, has never disclaimed the power to interfere with an arbitrary or excessive sentence, although within statutory limits.[10]

The lower court invoked *Blockburger* v. *United States*, 284 U. S. 299, as an impediment to its assumption of power. Yet this Court there stated (at p. 305):

> "Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that Court, with whose judgment *there is no warrant for interference* on our part." (Emphasis ours.)

Were "power" the issue, there would have been no occasion to discuss "warrant". This is made clear by the latest pronouncement of this Court in *Tomoya Kawakita* v. *United States*, 72 S. Ct. 950, 966 (1952), where the court, in relation to the severity of the sentence, stated:

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[10] The courts have always assumed power where the sentence imposed was in excess of the statutory limits. See cases cited by court below at R. 1671. This Court has similarly assumed power to modify a sentence where no statute governs the limits of punishment and penalty is left to the discretion of the court. *United States* v. *United Mine Workers*, 330 U. S. 258 (1947).

> "The trial judge imposed the death sentence. The argument is that that sentence was so severe as to be arbitrary. It was, however, within the statutory limits. Whether a sentence may be so severe and the offense so trivial that an appellate court should set it aside is a question we need not reach. The flagrant and persistent acts of petitioner gave the trial judge such a leeway in reaching a decision on the sentence that we would not be warranted in interfering. Cf: Blockburger v. United States, 284 U. S. 299, 305."

In short, the court did not deny its power, but because of the circumstances of the case, refused to exercise it.[11]

We submit that the circumstances in this case should move this Court to modify or set aside the sentences. The court need not fear that here, as in the *Blockburger* case there "may have been other facts and circumstances before the trial court properly influencing the extent of punishment". The court below acknowledges that the trial judge placed on the record all the grounds on which he based the death sentences (R. 1674). The vice of the sentences imposed on these petitioners lies not only in the grounds he stated publicly (discussed in Point IV above), but as well on his elision of facts within and dehors the record which rationally bear upon the measure of punishment.

Undoubtedly, were the sentences founded on "materially untrue" facts and assumptions, as we have demonstrated in Point IV above, they not only offend due process, but, as well, constitute an abuse of the discretion of the sentencing judge.

For it cannot be forgotten that, in addition, the trial judge disregarded other factors that are ordinarily brought to bear on sentence.

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[11] In any event, if this Court adheres to the view of the lower court that this Court's decision in the *Blockburger* and *Kawakita* cases stand for a denial of power, we press upon this Court that such a construction should be overruled as suggested by the concurring opinion of Judge Frank below (R. 1672-77). See also Hall, *Reduction of Criminal Sentences on Appeal*, 37 Col. L. Rev. 521, 762 (1937).

The conviction of the petitioners was procured on accomplice and professional informer testimony with a patina of circumstantial evidence (R. 1648), against the sworn denials of the petitioners in their own defense (R. 1051-1401). Sufficient evidence to prove guilt beyond a reasonable doubt was entirely lacking without the testimony of these accomplices, who, hopelessly entrapped, consummated deals with the Government to accuse the petitioners and so avoid or mitigate punishment for their malefactions (R. 556-67, 594-608, 715-21, 729-47, 757-61, 780, 784-86, 792-93, 593, 740, 1638). Such a case has been characterized as "weak". *Krulewich* v. *United States*, 336 U. S. 400 (1949); *Berger* v. *United States*, 295 U. S. 78 (1935); *Glasser* v. *United States*, 315 U. S. 60 (1942); *United States* v. *Levi*, 177 F. 2d 827 (C. A. 7th, 1949). Justice Frank, concurring below, suggested consideration of this factor on modification of sentence (R. 1677).

The infirmity of a case built on accomplice testimony, is underscored in relation to these petitioners, when the Government announced that, contrary to the trial testimony, the petitioners were insignificant cogs in the alleged Soviet espionage apparatus. Within a week after the imposition of sentence upon the petitioners, a highly authoritative government report rated Fuchs, May and Greenglass (along with British, Bruno Pontecorvo) as the only important atomic espionage agents, and subordinated the petitioners to a minor place. *Report on Soviet Atomic Espionage*, Joint Comm. on Atomic Energy, 82nd Cong., 1st Sess. (U. S. Gov't Printing Office, 1951), pp. 5-7. *Accord: The Shameful Years*, House Comm. on Un-Am. Activities (U. S. Gov't Printing Office, 1952).

Furthermore, never before in the entire history of the United States has a civil court, either in peace or war, decreed a sentence of death for the crime of espionage (R. 1671). For that most grave of all crimes, treason, only two death sentences have been imposed since the adoption of the Constitution (R. 1671) and no execution

has taken place. In the midst of the last war three persons, and after the close of hostilities five persons were charged with, tried for, and convicted of treason for adherence to an enemy that was despicable to the entire world for a wantonness unparalleled in human history. No one of these was executed for his crime.[12]

In the context of allegedly the same network of Soviet atomic espionage agents, the subject of this case, only prison sentences were meted out: David Greenglass, 15 years (R. 1638); Harry Gold, 30 years (R. 801); Ruth Greenglass, David's wife, a co-conspirator, though not a defendant, never indicted for her crime and presently a free woman (R. 593, 740). The same is true of other convicted Soviet atomic espionage agents: Dr. Klaus Fuchs, in England, 14 years; Allan Nunn May, in England, 10 years. *Report on Soviet Atomic Espionage, op. cit., supra.*

This shocking departure from the American tradition against vengeful punishment, and the inverse disparity between these sentences and the punishment meted out to others, according to the Government, more culpable, marks the magnitude of the abuse of the sentencing judge in the exercise of his discretionary powers.

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[12] *During hostilities: United States* v. *Cramer*, 137 F. 2d 888 (C. C. A. 2d, 1943), rev'd 325 U. S. 1 (45 years and $10,000); *Haupt* v. *United States*, *supra* (life imprisonment and $10,000); *Stephan* v. *United States*, 133 F. 2d 87 (C. C. A. 6th, 1943), cert. den. 318 U. S. 781 (death sentence imposed but not executed).

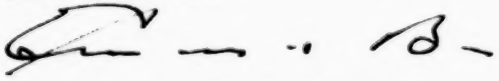
*After cessation of hostilities: Chandler* v. *United States*, 171 F. 2d 921, cert. den. 336 U. S. 918 (life imprisonment and $10,000); *Best* v. *United States*, 184 F. 2d 131 (C. A. 1st, 1950) (life imprisonment and $10,000); *United States* v. *Burgman*, 87 F. Supp. 568 (D. C., D. C., 1949), aff'd 188 F. 2d 637 (imprisonment, term not mentioned). The two women in the group, better known as "Axis Sally" and "Tokyo Rose", were given minimal prison sentences. *Gillars* v. *United States*, 182 F. 2d 962 (App. D. C., 1950) (10 to 30 years' imprisonment and $10,000); *D'Aquino* v. *United States*, 180 F. 2d 271 (C. A. 9th, 1950) (10 years' imprisonment and $10,000).

The sentence was a product of the abandonment of rational standards. Judicial balance gave way to unjudicial surrender to the political clamor that invaded this case. This Court, the ultimate protector of an accused, helpless against the forces of passion and prejudice, has the responsibility to remedy the irreparable and imminently irrevocable harm suffered by these petitioners.

## CONCLUSION

**The petition for rehearing should be granted, this Court's order of October 13, 1952, vacated, and a writ of certiorari issued to the United States Court of Appeals for the Second Circuit.**

Respectfully submitted,



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